2001

State of Utah, in the interest of Summers Children v. Orin John Wulffenstein : Brief of Appellant

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE OF UTAH,
In the Interest of:

SUMMERS CHILDREN,

Persons under 18 years of age.

No. 14297

BRIEF OF APPELLANT

Appeal from Orders of the Second District Juvenile Court for Salt Lake County, State Of Utah, the Honorable John Farr Larson, Judge, presiding.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE OF UTAH, In the Interest of SUMMERS CHILDREN, Persons under 18 years of age.	:	No. 14297

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action seeking the termination of parental rights of Orin John Wulfferstein, the father of Tommy Summers (June 23, 1970) and Tina Marie Summers (July 18, 1971), under the statutory authority of Utah Code Annotated §55-10-109 (1953).

DISPOSITION IN LOWER COURT

The case was tried to the Court. From an Order terminating the parental rights of Orin John Wulfferstein, he appeals. From an Order denying the Motion to Produce

Additional Testimony and Alternative Request for New Trial filed on behalf of Orin John Wulffenstein, he appeals.

RELIEF SOUGHT ON APPEAL

Appellant Orin John Wulffenstein seeks reversal of the Order terminating his parental rights and judgment in his favor as a matter of law. In the alternative, Appellant Wulffenstein seeks reversal of the Order denying his Motion to Produce Additional Testimony and Alternative Request for New Trial and judgment in his favor as a matter of law.

STATEMENT OF THE FACTS

A petition to terminate parental rights was filed on March 2, 1972, as to the natural mother, Yvonne Viola Summers. A supplemental petition was filed on November 14, 1972, so as to include the natural father, Orin John Wulffenstein, the Appellant in this case. At the time the two petitions were filed, Appellant was incarcerated at the Utah State Prison and had been so confined since February, 1971. He was released on May 15, 1973. From July 26, 1973 to August, 1974, he was incarcerated in the Salt Lake City and County Jail, pursuant to charges which were subsequently dismissed. He was transferred from the jail to the Utah State Prison in August, 1974, and was subsequently paroled to the Odyssey House rehabilitation facility in Salt Lake City. He dis-

appeared from Odyssey House on October 23, 1974, and his whereabouts were unascertained until May 10, 1975. After his reappearance he was returned to the Utah State Prison where he is presently incarcerated.

For reasons unknown to Appellant, the hearings conducted on the petition to terminate his parental rights were not conducted until over two years after the petition was filed. He was available for appearance up until the time of his disappearance from Odyssey House. The hearing was conducted at three sessions, on February 5, March 12, and May 8, all in 1975. Appellant did not attend nor was he aware of these proceedings. The Court entered an Order terminating Appellant's parental rights on May 9, 1975. The parental rights of the natural mother were previously terminated on June 26, 1974, and she is now deceased. There were not then nor are there now other persons desiring to adopt Appellant's minor children. In the Order terminating the parental rights of Appellant, the Court set a hearing for review of the matter on September 11, 1975.

On September 9, the review hearing was conducted. At the hearing arguments were advanced concerning a Motion to Produce Additional Testimony and Alternative Request for New Trial and on Objection to Findings of Fact and Conclusions of Law, both filed on behalf of Appellant. The Court entered

an Order denying the motion and objection on September 16, 1975. Attached to this Brief is a copy of an affidavit of Appellant, stating the testimony and evidence he would have offered on his behalf had the Court granted his request do so do and pertaining to his attitude toward resuming custody of his minor children.

ARGUMENT

POINT I. THE TRIAL COURT ERRED IN PERMANENTLY DEPRIVING THE PARENTAL RIGHTS.

A. The Statutory Grounds for Termination were not Established Under the Facts and Circumstances of this Case.

Utah Code Annotated §55-10-109(1) sets forth the basis for deprivation of parental rights. It provides as follows:

> . . .
>
> (1) The Court may decree a termination of all parental rights with respect to one or both parents if the Court finds:
>
> (a) That the parent or parents are unfit or incompetent by reason of conduct or condition seriously detrimental to the child; or
>
> (b) That the parent or parents have abandoned the child. It shall be prima facie evidence of abandonment that the parent or parents, although having legal custody of the child, have surrendered physical custody of the child, and for a period of six months following such surrender have not manifested to the child or to the person having the physical custody of the child a firm intention to resume physical custody or to make arrangements for the care of the child; or

A third ground for termination, U.C.A. §55-10-109(1)(c), is not reprinted since it is neither applicable to the instant case nor has it been asserted by the parties. The trial Court concluded that the minor children of Appellant came within the provisions of U.C.A. §55-10-109.

A Court is prohibited from depriving a parent of the custody of its child unless it finds from the evidence the necessary facts required to be found for that purpose. Appellant contends that he has neither abandoned his minor children nor is he unfit or incompetent by reason of conduct or conditions seriously detrimental to the children, and that therefore the statutory grounds for termination of parental rights have not been satisfied.

1. Appellant Has Not Abandoned or Deserted His Minor Children.

The legal standard for abandonment in Utah is set forth by this Court in the case of In Re Adoption of Walton, 123 U. 380, 259 P.2d 881 (1953), as follows:

> ...abandonment must be with a specific intent to do so, – an intent to sever all correlative rights and duties incident to the relationship. Such intent must be proved by him who asserts it, by proof that not only preponderates, but which must be clear and satisfactory, – something akin to that degree of proof necessary to establish an offense beyond a reasonable doubt, or, as one authority put it "by clear and indubitable evidence." Id, at 883 (emphasis supplied, footnotes omitted).

Although the instant case concerns termination of parental rights, as opposed to an adoption which was contemplated in the Walton decision, Appellant submits that the standard for abandonment is as stringent for termination of parental rights as it is for adoption. The factual issue concerned in Walton was whether the parent had abandoned the child such that parental consent was not required for another party to adopt the child. In the present case, there did not exist a third party desiring to adopt the minor children. Thus the desirability for a Court finding abandonment here is diminished.

In applying the Walton principles of abandonment to the instant case, there has been no clear and satisfactory showing of an intent by Appellant to abandon his minor children. The Findings of Fact entered by the trial Court state that Appellant has (1) not provided financial support; (2) had little or no contact; and (3) not manifested an intent to resume custody. While the third finding is not conceded by Appellant and is attacked, infra, these Findings are nonetheless insufficient to establish the specific intent required in the Walton standard.

This Court elaborated on the concept of abandoment in the case of In Re Adoption of Jameson, 20 U.2d 53, 432 P.2d 881 (1967), where the factual issue presented was again whether the parent had abandoned the child such that parental

consent was not required for the child to be adopted. In that case the parent had been convicted of a crime and sent to prison, and the party seeking to adopt the children argued that commission of the offense did in effect forsake the children, and asked the Court to re-examine the standard of abandonment set forth in Walton, supra. This Court rejected the arguments of the party seeking adoption, and ruled the standard of abandonment to be:

> an intentional abandonment of the child rather than a separation due to misfortune or misconduct. Jameson, at 882.

The facts of the present case are squarely within the holding of the Jameson decision. Appellant has been incarcerated for substantially all of the duration of his children's lives, and for this reason has been unable to make contact with his children. Thus Appellant has not abandoned his children intentionally as required in the Jameson case.

While it is conceded that Appellant has not furnished financial support for his minor children, this is not a basis for a finding of abandonment, at least where the parent's failure to provide needed financial assistance is with just cause. (See In Re Adoption of Maestas, 531 P.2d 492 (Ut. 1975) and Walton, Supra.) Appellant, while incarcerated, is unable to provide financial support for his children. Thus, just as the fact of incarceration does not show abandonment, neither can the lack of financial support due

to incarceration support a finding of abandonment.

The Maestas decision offers additional reasons why the adoption decisions of this Court are good authority in resolving the abandonment issue in a termination of parental rights proceeding, at least under the facts and circumstances of this case. The resolution of the abandonment question does not contemplate the best interests of the child, but is limited to the standard of abandonment. As the Court stated:

> The trial court properly held that the question of the welfare of the child is not material in a judicial determination of abandonment. Where the custody of the child is being determined, as in a case of habeas corpus, the welfare of the child is of paramount importance. However, in the instant matter the custody of the child was not directly involved. The controversy was as to whether or not the father had abandoned the child so that an adoption might be had without his consent thereto being given in writing. Id, at 494 (emphasis supplied, footnotes omitted).

In the present case, as in the adoption cases, the custody of the minor children is not directly involved. Appellant does not seek custody at this time nor could he, due to his incarceration, but is concerned with retaining his parental rights upon release. Thus while the welfare of the children is pertinent to a custody proceeding, it has no bearing on the initial determination as to whether the parent has abandoned the child.

2. Appellant Is Not Unfit Or Incompetent By Reason Of Conduct Or Conditions Seriously Detrimental To His Minor Children.

The trial court found the following conduct or conditions to be seriously detrimental to his children: (1) aggressive criminal behavior; (2) incarceration; and (3) escape. While Appellant does not concede any of these findings and attacks each of them, infra, they are nonetheless insufficient to establish the standard of seriously detrimental as set forth in U.C.A. §55-10-109(1)(a).

The leading case in this jurisdiction on this point is State v. Lance, 23 U.2d 407, 464 P.2d 395 (1970) in which this Court reversed a termination of parental rights on the ground of being unfit or incompetent by reason of conduct or condition seriously detrimental to the children. The Court commented on the narrow grounds available to terminate parental rights by stating that:

> In Section 55-10-32, U.C.A. (1953), the predecessor statute to Section 55-10-109, the legislature specified certain factual situations (such as conviction of a felony) that would constitute grounds to deprive a parent of the custody of his child, regardless of the effect of such facts upon the child. The legislature has, in a sense, narrowed the grounds in Section 109 to those situations where the acts of the parents (although unspecified) have a seriously detrimental effect on the child. Id, at 397 (emphasis supplied).

Thus incarceration based on conviction of a felony is not conduct or a condition which is considered by itself to be seriously detrimental to the children in Utah today. To the same effect is Jameson, Supra; see also Fronk v. State, 7 U.2d 245, 322 P.2d 397 (1958). The inquiry today is one which focuses upon the effect on the children rather than specific conduct or condition. Thus a correlation between the alleged aggressive criminal behavior and the escape of Appellant and its effect upon the children must be shown, rather than the fact in and of itself. This requirement of correlation is examplified in the Lance holding, which concluded there to be insufficient evidence to support a finding of behavior seriously detrimental to the children.

In the absence of such a showing of correlation, the alleged aggressive criminal behavior and escape go no farther than mere incarceration, and thus do not demonstrate conduct or condition seriously detrimental to the children. Appellant submits that such a correlation does not exist under the facts and circumstances of this case nor was it shown at the trial court. To illustrate this proposition, it can be shown that in this case Appellant's absence from Odyssey House has nothing really to do with his children, nor was the length of the departure of such duration to disinterest in the children. Further discussion of the

Court's Findings of Fact with regard to seriously detrimental conduct or condition will follow in subsequent sections of this Brief.

B. The Findings of Fact Neither Are Supported by The Record Nor Do They Support The Order Of The Court Below.

The Findings of Fact and Decree entered by the trial Court provided, in pertinent part, as follows:

FINDINGS OF FACT

. . .

2. The father of the children, Orin John Wulffenstein, is unfit or incompetent by reason of conduct or conditions seriously detrimental to the children because he is emotionally unstable and cannot provide the security, stability and modeling necessary for said children as exhibited by:
   (a) A long history of aggressive criminal behavior;
   (b) Incarceration in the Utah State Prison; and
   (c) Escape from the Utah State Prison.

3. The father of the children has abandoned said children in that:
   (a) He has not provided any financial support for the children;
   (b) He has had little or no contact with the children since their birth;
   (c) He has not manifested any intention to resume custody of said children; and
   (d) His present whereabouts are unknown.

. . .

From the above the Court concludes that the above-named children come within the provisions of Section 109 of the Juvenile Court Act of 1965, as amended.

ORDER

> It is therefore ORDERED, ADJUDGED, AND DECREED that all of the rights of the father, Orin John Wulffenstein, including residual rights be and they are hereby fully and completely terminated; . . . and said matter is set for review September 11, 1975.

Appellant subsequently filed an objection to the above Findings and Conclusions as not being consistent with the evidence presented, which was denied. Appellant at this time reasserts his objection to the above Findings and Conclusions, and contends that the denial of his objection was in error such that the order terminating his parental rights must be reversed.

In the Findings of Fact it is stated that Appellant is emotionally unstable and cannot provide the security, stability and modeling necessary for his minor children. In reality this statement was not a finding but a conclusion based on the three subheadings under Finding No. 2. Thus this discussion focuses on the factual allegations of the subheadings rather than conclusory statement, and Appellant would contend that the conclusory statement is unfounded and not supported by the record.

The Court found that Appellant has a long history of aggressive criminal behavior, has been incarcerated in prison, and has escaped from prison. While Appellant concedes that he has been incarcerated at the Utah State Prison, it is

contended that the other two findings are in error. First, as to criminal history, Appellant submits that the appropriate history to examine is that since the birth of his minor children. This is based upon the fact that during the prior criminal history Appellant was a juvenile and that this period does not accurately reflect his present character. It is also based on the proposition that there must be a correlation between the conduct or condition and the consideration of terminating parental rights. Since the birth of his children, Appellant has been convicted of one felony (burglary) for which he is now serving sentence at the Utah State Prison. The only other adult criminal adjudication on the record before the trial court was a revocation of parole, which was based on criminal charges that were subsequently dismissed. One adult felony conviction and one parole violation are not sufficient to demonstrate a history of criminal behavior. As to escape, no evidence was introduced that Appellant escaped from the Utah State Prison nor has he ever so escaped. Evidence was introduced that he left Odyssey House against medical advice in October 1974, and a warrant was subsequently issued for his arrest by the Utah State Board of Pardons. However, he has not been charged nor convicted of escape with regard to leaving Odyssey House. Thus it was error to find that Appellant escaped from the Utah State Prison.

The Court also made findings which purported to show abandonment by Appellant of his children. The findings that he has not provided financial support and that he has had little or no contact with the children do not support a showing of abandonment for reasons elaborated in POINT I.A. Again it must be pointed out that Appellant has been incarcerated for the substantial duration of his children's lives and thus unable to support or contact them. The finding that he has not manifested any intention to resume custody of said children is not supported by the record, and in fact is clearly refuted by testimony offered in evidence by the State of Utah. The record discloses that most of the witnesses never discussed the family relations in interview with Appellant, and the testimony of the children's social worker demonstrates Appellant's continuing desire to have eventual custody of his children (Transcript, p. 18, In. 21-25; p. 20, In. 30 to p. 21, In. 10; p. 22, In. 12-14). Thus a finding of no intent to resume custody, where such intent has been shown in testimony not refuted elsewhere in the record, is clearly error. The finding that Appellant's whereabouts are unknown is only partially true. While his wereabouts were concededly unknown as of the date the Findings were entered by the Court, his whereabouts as of the date the the review hearing was conducted in September, 1975, were known.

The grant of the review hearing impliedly contemplated that the previous Findings were not necessarily final, but would encompass subsequent events up to the date set for review. Thus it was error to make a finding that Appellant's whereabouts were unknown, without modifying such a finding upon Appellant's return prior to the review hearing.

Since it was error to find that Appellant is unfit or incompetent by reason of conduct or conditions seriously detrimental to the children, or that he abandoned the children, since in each case the underlying reasons for each finding were not supported by the record, it was error in turn to conclude that Appellant's children were within the provisions of U.C.A. §55-10-109(1), and to terminate Appellant's parental rights.

POINT II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRODUCE ADDITIONAL TESTIMONY OR IN THE ALTERNATIVE FOR A NEW TRIAL.

The Trial Court entered its Findings of Fact and Decree ordering the termination of Appellant's parental rights on May 9, 1975, and set a hearing date for review of the matter in September. Prior to the hearing date, Appellant's whereabouts were ascertained, his parole revoked, and he was subsequently transferred to the Utah State Prison. Appellant's attorney filed a motion to produce additional testimony and alternative request for a new trial

on July 16, 1975, for the reason that Appellant was unavailable for past proceedings and was desirous of giving testimony in his own behalf and of obtaining custody of the minor children. The motion was denied on September 16, 1975.

A. The Denial of Appellant's Motion Constituted an Abuse of Discretion.

Courts have not hesitated to build a strong fortress around the parent-child relationship, and have stocked it with ammunition in the form of established rules and policies that add to its impregnability. This paraphrased axiom of Justice Henroid is demonstrated by the judicial policy of reluctance in Utah to permanently sever family relationships. The Court has repeatedly noted such judicial reluctance, which was perhaps best expressed in State v. Lance, supra.:

> Deprivation of the parent's custody of their children is a drastic remedy which should be resorted to only in extreme cases and when it is manifest that the home itself cannot or will not correct the evils which exist. The cutting of family ties is a step of utmost gravity and is undesirable both socially and economically and should be avoided unless that is the only alternative to be found consistent with the best interests of the children. Id., at 397.

The Lance decision reflects a composite of principles expressed by Justice Crockett in the earlier decision of

State v. Dade, 14 U.2d 47, 376 P.2d 951 (1962). Both Lance and Dade concerned deprivation of custody proceedings and are pertinent to the case at bar. In Fronk v. State, supra, this Court reversed an order terminating parental rights and stressed the importance of the family relationship stating:

> It [the juvenile court] was not created for the purpose of substituting persons, other than the natural parents, to take over the children. It should seek in every way, short of such a substitution, to preserve and maintain that bond of parental affection which has been throughout the existence of mankind the most potent force for safeguarding the interest and welfare of the oncoming generation. Id, at 402.

Thus, the Utah Courts approach termination of parental rights proceedings with a preconceived reluctance to break family ties.

Beyond the judicial reluctance to interfere with parental rights, there exists a strong presumption that the natural parents are best suited for raising their children. This presumption has been noted by this Court on numerous occasions and was best expressed in the decision of In Re State, 11 U.2d 393, 360 P.2d 486 (1961), which involved efforts by the natural parents to regain custody of their children:

> Furthermore, this Court has repeatedly recognized that there is a presumption that it will be for the best interests of the child to be raised under the care, control and supervision of its natural parents. Such presumption is only over-

> come when the trier of the facts is convinced by the evidence that the welfare of the child requires that the child be awarded to someone other than the natural parents. Thus, the ultimate burden of proof on this question is always in favor of the natural parents and against any other person seeking custody of such child. Id, at 397.

This presumption is also noted in State v. Lance and State v. Dade, supra. While this presumption can be rebutted, it is strong presumption which will not be taken lightly.

With the judicial reluctance to terminate parental rights and the presumption that it is in the best interests of children to be in the custody of their parents in mind, an examination of the facts in this case is appropriate. The termination of parental rights proceedings were conducted in the absence of Appellant. The State, while desiring to place the children for adoption, had no affirmative plans for adoption and no one in mind to assume the role of parent for these children. The natural mother of the children is deceased. Had Appellant been able to attend the termination proceedings, he would have offered in evidence testimony on his behalf and in rebuttal of the other evidence, as is set forth in his Affidavit attached to this brief as the Appendix. His whereabouts were ascertained shortly after the Order of the trial Court terminating his parental rights and well before the review hearing was conducted. His

intent of desiring to resume custody of his children was promptly brought to the Court's attention. Yet, despite all this, and in view of the aforementioned judicial reluctance and parental presumption, the Court refused to hear the additional testimony in reviewing the matter. The additional testimony, had it been allowed, would have substantially consisted of the matters set forth in the Appendix. Appellant contends that the denial of the opportunity to present the additional testimony constituted an abuse of discretion.

The leading case in this jurisdiction on the abuse of discretion standard in the custody setting is In Re State, supra. In that case, the parents had already had their parental rights terminated, and sought restoration of custody based on changed conditions approximately five months later in a separate proceeding. Their rights were terminated in the absence of replacement guardians seeking to adopt the children. The trial Court refused to grant a hearing on the parents' petition for restoration of custody. On appeal the parents made a proffer of the evidence that would have been presented had a hearing been conducted, and argued that it was error to deny them an opportunity to be heard. This Court reversed the decision and directed the lower

Court to conduct a hearing.

> However, since the parents have presented an issue of fact under which the parents probably can make a showing that the best interests of these children requires that they be reared by their natural parents, the trial court abused its discretion in refusing to give them a hearing. Id, at 398-9 (emphasis added).

Appellant contends that the present case is squarely within the facts and holding of this decision, and therefore that it was an abuse of discretion to deny Appellant's motion to produce additional testimony. In this case, Appellant has intervened shortly after his parental rights were terminated and seeks to overturn the termination order. His rights were terminated in the absence of replacement guardians, and he was denied a hearing for the purpose of offering testimony in his behalf. Appellant now makes a proffer of what testimony he would offer in evidence, had he been afforded the chance, and contends that the trial Court abused his discretion. The appeal here is strengthened by two factors. First, Appellant's intervention is made in the same proceeding which had already set a hearing date for review. Second, the parents in In Re State voiced no objection to the appropriateness of previously terminating their parental rights under the conditions existing at the time. In contrast, Appellant challenges the appropriateness of the initial termination order under circumstances in which he had no opportunity to present his position. Thus, In Re State appears to control the resolution of the abuse

of discretion issue.

It is clear from the case law in Utah that this Cour will reverse an order terminating parental rights where it is shown that the trial Court abused its discretion. In Fronk v. State, supra, this Court found such an abuse, although the parent had been convicted of a felony, and reversed the termination order. The termination proceedings were conducted in the absence of the appealing parent, and did not contemplate a specific replacement guardian. Thus, this decision seems to factually contemplate a situation similar to the case at bar, and supports Appellant's claim here as to an abuse of discretion.

There is a significant factual distinction between proceedings conducted to terminate parental rights where there is or is not a replacement guardian ready to assume the role of parent to the minor children. The significance lies in the evaluation of the best interests of the child. This distinction has been expressed as follows:

> In contrast, in a juvenile court proceeding for termination of parental rights, the State seeks to sever the parent-child relationship without regard to whether another alternative is available for the child. Here, the action or nonaction by the parent and its impact on the child must be judged by asking whether the situation of the child in the custody of the biological parent is so bad as to warrant termination even if the child remains in foster or institutional care for the rest of his minority. That is a qualitatively

> different question than making a choice between known alternatives of adoptive parent or biological parent. Aaron, Utah Adoption, 1970 Utah Law Review at 342-3 (footnotes omitted, emphasis added).

The thrust of Professor Aaron's comments as applied to a situation like the case at bar is that where the State does not have affirmative plans for adoption of the children, the termination of parental rights at this point serves no purpose and therefore does not comport to the objective of termination. The issue of termination in such a situation thus should not rise until there are present identifiable persons to adopt and assume the role of parent. Thus, the very fact of terminating parental rights under the facts and circumstances of this case suggest that an abuse of discretion has occurred.

When viewing as a whole the judicial reluctance to terminate parental rights, the presumption that the parent is best suited to have custody of his children, the case law in Utah on abuse of discretion in termination proceedings, the objectives of termination and the distinction where no replacement guardian is present, and the facts and circumstances of this case, the trial court committed an abuse of discretion in denying Appellant's motion to produce additional testimony.

B. Appellant was Improperly Denied an Opportunity to be Heard Consistent with Constitutional Principles of Due Process of Law.

In In Re State, supra, this Court suggested (although did not hold) that the denial in granting a hearing to the adoptive parents by the trial Court may have suffered from a lack of due process of law.

> Also, it is very unusual for a Court to attempt to determine facts without hearing all of the evidence available which has a bearing on that question. This is particularly true in a case where the trial Court is called upon to determine a complicated question such as, what will be most beneficial to the child. Ordinarily to refuse to hear all the evidence available on an issue of fact would be a violation of due process of law. Id, 397-8.

This Court went on to state that, under the particular facts of that case, there probably was no lack of due process, but resolution of this issue was rendered unnecessary since the denial of the hearing was held to constitute an abuse of discretion and thus reversible error.

Justice Henroid, in a well reasoned opinion concurring with the In Re State majority, would have found a denial of due process of law. After first noting the fact in that case the juvenile court, in its order depriving the parents of custody, specifically retained continuous jurisdiction until an adoption was granted by an appropriate court, the opinion commented upon the implications of such a reservation.

> Having done so, without specifying the precise purpose therefore, I am of the opinion that in this particular case inherently was included in such reservation of jurisdiction, a requirement that the least that could be done upon petition for restoration of custody would be to hear the natural parents out in an

> eleventh hour hope that it could be established that a sincere effort had been made on the part of the parents to preserve the relationship of parent and child, re-establish confidence in and enjoy the companionship of those who are their own flesh and blood, and that their mission had been accomplished. Id, at 490.

The facts of the present case suggest that the trial Court has also retained continuous jurisdiction over the matter, by setting a review hearing date upon its entry of the Order terminating Appellant's parental rights. Further, Appellant's need for a hearing in this case is more compelling, since he was not heard at all prior to the original termination order. Thus to deny Appellant's motion to produce new testimony operated as a denial of due process of law.

The facts of the instant case demonstrate secondary reasons for finding a denial of due process. The supplemental petition seeking permanent deprivation of parental rights was filed with the trial Court on November 14, 1972. However, the proceedings as to Appellant were not conducted until February 5, 1975, and concluded on May 8, 1975, a period exceeding two years from the filing of the petition. Appellant's whereabouts and readiness to appear in Court were readily ascertainable from the date the petition was filed until October 23, 1974, a period just under two years. His whereabouts became readily ascertainable again on May 10, 1975, and have remained such since that date. Thus,

for reasons unknown to Appellant, the juvenile Court seems to have been reluctant to adjudicate his parental rights, at least that is until he became unavailable to appear at such termination proceedings. Once his whereabouts could not be ascertained, the juvenile Court promptly proceeded to hear the petition for deprivation of parental rights. Then, once Appellant's whereabouts were again ascertainable, and despite the fact that a hearing date for review of the matter had been set, the juvenile Court resumed its unwillingness to further adjucate Appellant's parental rights. This whole course of judicial conduct smacks of abuse, and Appellant submits that such conduct operated as a denial of due process of law as to him. In particular, that to deny Appellant the opportunity to produce additional testimony, in view of the whole course of conduct by the juvenile Court, amounted to both an abuse of discretion and a denial of due process.

CONCLUSION

Based on the facts, law and reasoning set forth herein, the decision of the Second District Juvenile Court, Salt Lake County, State of Utah, should be reversed and Mr. Wulfferstein's parental rights restored to him, or in the alternative, the trial Court should be required to take additional testimony before terminating Mr. Wulfferstein's

parental rights.

Respectfully submitted,

Richard T. Black

RICHARD T. BLACK
Attorney for Appellant

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on this ____day of _____, 1976, I hand-delivered a copy of the foregoing Brief of Appellant to the office of the Attorney General, State Capitol Building, Salt Lake City, Utah 84114, and to the Salt Lake County Attorney, 3522 South 700 West, Salt Lake City, Utah 84119.

APPENDIX

AFFIDAVIT OF ORIN JOHN WULFFENSTEIN

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

ORIN JOHN WULFFENSTEIN, being first duly sworn upon oath, deposes and states:

That, if he were permitted to adduce further testimony and evidence concerning the termination of his parental rights, the following would be offered:

1. That he is the natural father of Tammy Summers and Tina Marie Summers, minor children.

2. That he desires to retain parental rights and responsibilities over said minor children, including regular visitation with them.

3. That he intends to establish a family household with said minor children upon his release from the Utah State Prison.

4. That the trial court refused to resolve the controversy for a period exceeding two (2) years from the filing of the Petition, during which time he would have been available for appearance.

5. That he was unaware of the court proceedings on February 5, 1975, March 12, 1975, and May 8, 1975, and would have appeared if he had known of the hearings.

6. That he has been unable to support said minor children since he has been incarcerated for the substantial portion of their lives.

7. That he made numerous attempts to arrange visitation with the Division of Family Services while in prison which proved unsuccessful.

8. That he was only permitted two (2) visits with the children during his release in the Summer, 1973, despite attempts made to arrange additional visitation through the Division of Family Services.

DATED this _____ day of April, 1976.

ORIN JOHN WULFFENSTEIN

SUBSCRIBED AND SWORN to before me this 26 day of April, 1976.

NOTARY PUBLIC
Residing at:

My commission expires:
19 Feb 1980